United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7172

In The

United States Court of Appeals

For The Second Circuit

WALTER J. MEYER,

Plaintiff-Appellant,

-against-

LOUIS J. FRANK, Commissioner of Police, Nassau County Police Department, and CHRISTOPHER QUINN, Trial Commissioner and Inspector, Nassau County Police Department.

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

B P/S

BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUES PRESENTED

A. Was the plaintiff's action, brought under the Civil Rights Act, barred by the statute of limitations?

B. Does a paramount federal policy or interest demand that the statute of limitations be tolled during the period of state court litigation designed to resolve the alleged wrong?

C. Should the federal cause of action be deemed to accrue only upon the exhaustion of state remedies to review administrative determinations?

STATEMENT OF THE CASE

Plaintiff, a veteran and resident of Nassau County, was duly appointed as a Patrolman to the Nassau County Police Department (hereinafter referred to as "the Department") on October 1, 1953. In 1960 he was promoted to the rank of Detective in the Department. Plaintiff maintained a totally unblemished record in the Department, faithfully complying with all Rules and Regulations thereof, throughout his almost eighteen (18) year career.

On June 25, 1970 a Nassau County Grand Jury indicted plaintiff

and another Department Detective for the crime of an attempt to commit the crime of grand larceny in the first degree. Both men pleaded not guilty to this charge. This same day plaintiff was suspended, without pay, from the Department; his guns and badge were, accordingly, removed.

On July 2, 1970 plaintiff was charged by the Department with certain violations of the Department's Rules and Regulations based upon and with the specification limited to the identical charge and allegation for which plaintiff stood criminally indicted. Similarly, a plea of not guilty was entered in this civil proceeding.

A departmental trial on these charges was first scheduled for November 30, 1970 and adjourned on several occasions to April 8, 1971 due to plaintiff's counsel's actual engagement, and upon request of plaintiff's counsel. On April 8th the hearing was adjourned to April 22nd, at the request of the defendants.

On April 22, 1971, plaintiff's counsel requested another adjournment. When such motion was denied by defendant Quinn, plaintiff was advised by his counsel to stand mute and without the aid of counsel so as not to incriminate himself or otherwise prejudice his position in the then pending criminal prosecution. Plaintiff's counsel feared that plaintiff would be called as a witness in the civil

proceeding, and thus be forced to give testimony possibly prejudicial to his defense in the pending criminal action. Nevertheless, at the defendant Quinn's orders, the departmental trial commenced that day.

As a result of plaintiff standing mute and alone throughout the departmental trial, he was found guilty of the charges by defendant Quinn, and dismissed from the Department by order of defendant Frank on June 4, 1971.

This was the first and only instance to date in the history of the County of Nassau that a police officer facing both criminal and resulting departmental charges was forced to trial at the administrative level before his criminal trial took place.

The criminal case against plaintiff was called to trial for the first time on January 5, 1972. The plaintiff was tried jointly with Detective Cullinan in the Supreme Court of the State of New York, Nassau County. A jury was selected on January 10, and found a verdict of not guilty as to both men on January 14, 1972.

In August 1971, plaintiff's application pursuant to Article 78 of the New York CPLR to review and annul defendants' determination dismissing plaintiff from the Department on the sole and exclu-

sive ground that the defendants arbitrarily and unreasonably deprived plaintiff of his right to counsel of his choosing by virtue of their failure to grant plaintiff a further adjournment when plaintiff's counsel was actually engaged, was dismissed in the New York State Supreme Court, Nassau County. This judgment was affirmed, without opinion, by the Appellate Division, Second Department on October 19, 1973. In July 1973, motion for leave to appeal was denied by the New York State Court of Appeals.

On January 15, 1974 a verified petition on behalf of the plaintiff was served on defendants asking for a rehearing and reconsideration of the dismissal of plaintiff from the Department. On April 9, 1974, plaintiff was advised in writing that his application would not be considered.

By service upon the defendants on June 10, 1975 of a summons and complaint, plaintiff in the instant proceeding sought declaratory relief founded upon Title 42, United States Code, Sections 1983 and 1985 to redress the deprivation under color of law, of rights, privileges and immunities secured by the Constitution and Laws of the United States. More specifically, sought to be redressed was the fundamental right not to be compelled to give testimony which could be used in criminal prosecution, as guaranteed by the Fifth Amendment to the Constitution of the United States. Plaintiff

sought to annul the actions of the defendants, who, under color of law, and under color of their authority as police officials of Nassau County, subjected plaintiff to the deprivation of his right not to be compelled to give testimony which could be used to prosecute him criminally, and not to be deprived of the personal liberty to pursue a calling of his choice without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The defendants moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the complaint, inter alia, on the ground that the action was not timely instituted, as provided by Section 214(2) of the New York State Civil Practice Law and Rules. (Appendix at 41a).

By Memorandum and Order dated March 11, 1976 the District Court granted the defendants' motion to dismiss on the ground that the plaintiff's action was barred by the statute of limitations. (Appendix at 32a).

ARGUMENT

POINT I: PLAINTIFF'S ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS

Under the principles of Lombard v. Bd. of Educ., 502 F.2d 631 (2d Cir. 1974) a party aggreived by the action or determination of state officials acting under color of law, may seek redress from and contest such action through the state courts on non-constitutional grounds, and thus preserve for review thereafter by the federal courts claims arising under the Civil Rights Act arising out of this same action or determination. The aggreived party, therefore, by excluding his constitutional claims from his Article 78 proceeding may litigate his claim up to the New York State Court of Appeals, and, if unsuccessful, then pose the constitutional issue as the basis for federal relief under Section 1983. Thus, if satisfaction is not obtainable from the state courts on non-constitutional grounds, relief may still, thereafter, be sought from the federal courts on constitutional issues not actually or specifically raised before the state courts.

An action brought under 42 U.S.C. §1983 in New York must be commenced within three (3) years, pursuant to New York Civil Practice Law and Rules 214(2), from the action or determination complained of, or the accrual of the cause of action.

The Federal Courts, however, have recognized that, under state law, the running of the statute of limitations can be tolled, Ortiz v. LaVallee, 442 F.2d 912 (2d Cir. 1971). Further, although the state statute of limitations most analogous to the civil rights claim is borrowed, the question of when the claim for relief accrued

remains a question of federal law. Cope v. Anderson, 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947); Rawlings v. Ray, 312 U.S. 96, 61 S.Ct. 473, 85 L.Ed. 605 (1941). Similarly, the federal courts have held that a borrowed state statute of limitations may be tolled in conformity with federal doctrine where the right is the creature of federal statute, Holmberg v. Ambrecht, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946), or where it is thought that a short state statute of limitations would defeat a coincident federal purpose. Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296; see Movie Color Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir. 1961).

Consonant with this reasoning, supporting a paramount federal interest to be protected in actions under the Civil Rights Act, the Court of Appeals in Kaiser v. Cahn, 510 F.2d 282 (2d Cir. 1974) has recently held:

> 'we do not feel that we are necessarily bound by the state's determination of when its statute of limitations is tolled where the question arises in a civil rights claim in the federal court."

The Court in Kaiser, supra at 287, thus applied its "own standard of whether a statute of limitations unduly impairs the federal interest sought to be enfoced."

Similarly, in Burnett v. New York Central R.R., 380 U.S.

424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965) the Supreme Court held that a timely action under the Federal Employers' Liability Act in a state court, even though venue was improper, tolled the statute of limitations contained in the federal act. The Court suggested that the solution to the problem of "determining whether, under a given set of facts, a statute of limitations is to be tolled..." must be sought in legislative intent: "(T)he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." 380 U.S. at 427, 85 S.Ct. at 1054, 13 L.Ed.2d at 945. The search for such congressional intent, the Court held, must be pursued in "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." Id.

Undoubtedly, with these considerations in mind, the Court of Appeals in Mizell v. North Borward Hospital District, 427 F.2d 468 (5th Cir. 1970) tolled the running of the statute of limitations during the pursuit of state remedies to redress the alleged wrong.

In Mizell, supra, the defendants raised the plea of statute of limitations in an attempt to bar a Civil Rights Action under Section 1983 which followed a state court proceeding seeking the same results. In response the Court of Appeals noted:

"Much can be said in favor of the court's adoption of a rule with respect to 'tolling' that would further the policy of permitting state resolution of problems of this nature....

"Having in mind the salutary rule that under our system of federalism aggrieved persons should be encouraged to utilize state procedures before appealing to the federal courts cf. Henry v. Mississippi, 379 U.S. 443, 452, 85 S.Ct. 564, 13 L.Ed. 2d 408, we are persuaded that in cases arising under the constitution or laws of the United States, a federal rule on tolling a state statute of limitations (when applicable) should be observed, if such rule clearly carries out the intent of Congress or of the constitutional principle at stake.

..."We think that it is clearly within the underlying purpose of the Civil Rights Act to encourage utilization of state administrative and court procedures to vindicate alleged wrongs under a state created cause of action before requiring a plaintiff to bring his federal suit to prevent his being barred by a state limitations statute. Thus, although the federal courts apply a state limitations statute in suits to vindicate a federal right, they look to the federal purpose, policy and intent of Congress as to the objectives of the legislation in determining whether the pursuit of state remedies tolls this statute."

This decision was reviewed in Ammlung v. City of Chester, 355 F.Supp. 1300 (E.D. Penn. 1973), aff'd. 494 F.2d 811 (3rd Cir. 1974). Although the district court in Ammlung criticized, in part, the Court of Appeal's holding in Mizell, it nevertheless found that:

"Where established grievance or arbitration procedures are provided with review to state courts, it is clearly conceivable that such procedures could not be pursued to finality without risking the bar of the statute of limitations. Such resort to established state proce-

dures should be encouraged to the fullest extent. So limited to the above situations, Mizell is a sound decision." Ammlung, supra at 1310. (Emphasis added).

The Court in Ammlung expressly approved of the holding in Mizell in administrative review procedures "that plaintiffs in civil rights actions be encouraged to utilize state procedures prior to resorting to the federal courts." The Court merely held that "under the facts of the instant case, however," which did not involve a review of a state administrative determination, "these considerations are not present and we do not view Mizell as mandating a federally-fashioned rule as to tolling." Ammlung, supra at 1310.

It should be noted that the Fifth Circuit has reaffirmed its holding in Mizell in Guerra v. Manchester Terminal Corp., 498 F.2d 641, 649 N.13 (5th Cir. 1974); see also White v. Padgett, 475 F.2d 79, 85 (5th Cir. 1973).

In Taliaferro v. Dykstra, 388 F.Supp. 957, 960-61 (E.D. Virginia 1975), the Court analyzed the historical development and authority for the tolling of state statute of limitations, and adopted the reasoning of Mizell.

It is thus clear that while the federal courts have borrowed New York's three (3) year statute of limitations, paramount federal

considerations in actions brought under Section 1983 have frequently resulted in the tolling of such statute or the delay in the accrual of the Section 1983 action. Since under Lombard, as shown, plaintiff was entitled to exhaust non-constitutional issues via his Article 78 proceeding prior to the institution of the civil rights action, the paramount federal interest herein demands that the statute of limitations be tolled during the period of the state court litigation or that the federal cause of action not accrue until leave to appeal to the Court of Appeals from the dismissal of the Article 78 proceeding was denied.

Section 1983 gives to plaintiff, in the words of the Court of Appeals, "an independent, supplementary cause of action", Lombard, supra at 636. Therefore, such action should properly accrue upon the exhaustion of state court proceedings involving the coincidental, but non-constitutional issues. Were this not the rule, then a plaintiff who chooses to litigate his claim first in the state courts, preserving his constitutional claim for a subsequent civil rights action, could find his federal action barred by the delay in perfecting and exhausting his state court proceeding. That is, should the Article 78 proceeding take three (3) years to reach its unsuccessful conclusion, plaintiff's independent, supplementary cause of action under 1983 would be denied to him, thus defeating a paramount federal concern.

Accordingly, plaintiff submits that under either the tolling or delayed accrual theories from June 21, 1971, the day of the institution of the Article 78 proceeding in the Supreme Court, Nassau County, until July 1973, when the motion for leave to appeal to the New York Court of Appeals was denied, a period of two (2) years, the statute of limitations must be tolled. Since plaintiff was dismissed from the Department on June 4, 1971, and the federal action was commenced on June 10, 1975, when the statute is tolled during or the accrual of the federal civil rights cause of action is delayed until the exhaustion of the state court proceedings, plaintiff's federal action is well within the statute of limitations and thus timely. See Instruments Systems Corp. v. Whitman, Ranson & Coulson, 77 Misc.2d 719, 354 N.Y.S.2d 514 (Sup.Ct., N.Y. Co. 1974); Siegel v. Kranis, 29 A.D.2d 477, 288 N.Y.S.2d 831 (2nd Dept. 1968); Borgia v. City of New York, 12 N.Y.2d 151, 237 N.Y.S.2d 319, 187 N.E.2d 777 (1962); see also Barchet v. New York City Transit Auth., 20 N.Y.2d 1, 281 N.Y.S.2d 289 (1967).

POINT II

THE PAPAMOUNT FEDERAL INTEREST HEREIN DEMANDS THAT THE STATUTE OF LIMITATIONS BE TOLLED DURING THE PERIOD OF STATE COURT LITIGATION OR THAT THE FEDERAL CAUSE OF ACTION NOT ACCRUE UNTIL STATE COURT REMEDIES TO REVIEW ADMINISTRATIVE DETERMINATIONS ARE EXHAUSTED

The majority opinion in Johnson v. Railway Express Agency, ____U.S.____, 44 L.Ed.2d 295, 301, 95 S.Ct. _____ (1975) noted that:

> "Despite Title VII's (of the Civil Rights Act of 1964) range and its design for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief. '(T)he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under Title VII and other applicable state and federal statutes.' Alexander v. Gardner-Denver Co. 415 U.S. at 48, 39 L.Ed.2d 147, 94 S.Ct. 1011. In particular, Congress noted 'that the remedies available to the individual under Title VII are coextensive with the individual's (sic) right to sue under the provisions of the Civil Rights Act of 1866, 42 USC 1981, (42 USCS 1981) and that the two procedures augment each other and are not mutually exclusive.'"
>
> "...Petitioner, and the United States as amicus curiae, concede, as they must, the independence of the avenues of relief respectively available under Title VII and the older 1981.
>
> "...We are satisfied also, that Congress did not expect that a 1981 court action usually would be resorted to only upon completion of Title VII procedures and the Commission's efforts to obtain voluntary compliance."

Thus, the Court expressly held that constitutional issues may be raised both in the administrative complaint with the Equal Employment Opportunity Commission (EEOC), pursuant to Title VII of the Civil Rights Act of 1964, and, at the same time, in a federal section 1981 suit, since "happily for the civil rights claimant - Congress

clearly has retained 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time consuming procedures of Title VII." (Emphasis added). Therefore the Court presumed that Congress did not expect that a federal suit would be resorted to only upon completion of the Title VII administrative proceeding.

However, plaintiff in the instant proceeding could not have raised the same constitutional issues in both independent avenues of relief. As the Court of Appeals pointed out in Lombard v. Board of Educ., 502 F.2d 631, 636-37 (2d Cir. 1974) - which sought to annul the termination of Lombard's appointment as a teacher in the public schools - "where a constitutional issue is actually raised in the state court, as it can be in an Article 78 proceeding ..., the litigant has made his choice and may not have two bites at the cherry." Unlike Johnson, plaintiff could not have raised his constitutional issue in the state court, without barring his Section 1983 cause of action. Johnson, however, could have safely raised the constitutional issue in both proceedings, and then, if he choose not to pursue both avenues at the same time, he could have asked the Court, as the majority opinion suggested, to stay proceedings until the administrative efforts at conciliation and voluntary compliance had been completed.

As Justices Marshall, Douglas and Brennan pointed out in

their concurring and dissenting opinion in Johnson, both remedies are available to victims of discrimination practices under Title VII of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866. In a Section 1983 action, however, the plaintiff may expressly exhaust his state court proceedings via an Article 78, New York State Civil Practice Law and Rules, proceeding which does not raise Section 1983 constitutional issues, and then go to the federal court as the preferred forum for the assertion of constitutional claims, since Section 1983 gives him an independent, but supplementary cause of action.

Since plaintiff in Johnson could have raised the same constitutional issues in both proceedings at the same time, there was no need or reason to toll the statute of limitations for the institution of the federal Section 1981 suit until the Title VII proceeding was exhausted. Unlike Johnson, then, the tolling of the statute during and until completion of the Article 78 proceeding for the purposes of a Section 1983 court action furthers the policy of permitting state resolution of problems arising out of administrative determinations prior to federal court intervention. See Point I, supra.

Congressional enactments in cases involving charges of employment discrimination (Title VII and Section 1981) evinced a general intent to accord multiple parallel or overlapping remedies against

such discrimination. Section 1983, however, gives a claimant only an independent, supplementary cause of action; by definition, then, the state Article 78 proceeding cannot parallel the federal cause of action if it raises the same constitutional issues. On the contrary, it would preclude federal suit.

Johnson, as the majority noted, slept on his Section 1981 rights since he could have raised them at the same time that he took his administrative proceeding under Title VII. Plaintiff herein, however. was not in such a position, since a state court proceeding raising federal issues and a federal suit under Section 1983 are mutually exclusive and are not coextensive. The reasons for tolling which were thus absent in the opinion of the majority in Johnson, are clearly present and necessary in the instant matter.

As in Mizell, plaintiff herein choose first to exhaust the procedures provided in Article 78 CPLR in the state courts to review and annul the administrative determination to dismiss him, prior to institution of his federal Civil Rights Action. Such procedure was approved, and expressly encouraged, by the decisions in Johnson, Mizell and Ammlung.

If these policy considerations of encouraging resort to a

Section 1983 action only upon completion of prescribed state court remedies to review state administrative determinations, are to be fostered then on the facts of the instant proceeding the Court should toll the state statute of limitations. A contrary holding would defeat this paramount federal policy as well as the federal right itself. As the Court noted in Ammlung, "it is clearly conceivable that such (state court) procedures could not be pursued to finality without risking the bar of the statute of limitations."

As can be seen by the chronological sequence in the instant suit, a diligently prosecuted Article 78 proceeding to review an administrative determination will take about three (3) years to complete. In fact, in Lombard federal suit was commenced just some two (2) months short of three (3) years from Lombard's termination. That is, it took Lombard from June 1970, the date of his termination, until February 15, 1973 to exhaust his Article 78 remedies. Presumably, had the New York Court of Appeals granted Lombard leave to appeal or had there been a dissent, modification or reversal in the New York State Appellate Division, which would have given Lombard a right to appeal to the Court of Appeals (CPLR 5601), the exhaustion of his state remedies would have undoubtedly taken more than three (3) years to complete.

It is, therefore, suggested that both federalism and the policy of encouraging resort first to state court remedies to review state administrative determinations will be soundly defeated and frustrated by the failure to toll the statute of limitations during such time. Since the exhaustion of state remedies via an Article 78 proceeding would in most cases defeat the right to federal review of constitutional issues because of the delay involved, the tolling effect is necessary.

The dangers of undue delay are clearly avoided by the very short statute of limitations (120 days) provided in CPLR 217 for the commencement of such state proceedings.

CONCLUSION

The judgment appealed from dismissing the complaint herein should be reversed.

Respectfully submitted,

DAVID B. AMPEL
BY: IRA LEITEL, of Counsel

Attorneys for Plaintiff-Appellant

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
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- against -

LOUIS J. FRANK etal.,
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Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF **NEW YORK** *ss.:*

I, Velma N. Howe *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 298 Macon Street, Brooklyn, New York 11216

That on the **11th** *day of* **June** *19* **76**, *deponent served the annexed*

Appendix **Brief** *upon* **John F. O'Shaughnessy County Attorney Nassau County** *attorney(s) for* **Defendants- Appellees** *in this action, at* **Nassau County Executive Building West Street Mineola, New York 11501** *the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this **11th** *day of* **June** *19* **76**

Velma N. Howe

VELMA N. HOWE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977